

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000929-MR

JAMES ROBINSON

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 13-CR-00022 & 13-CR-00063

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, DIXON, AND MAZE, JUDGES.

MAZE, JUDGE: James Robinson appeals the Lincoln Circuit Court's order denying, without an evidentiary hearing, his motion to vacate his judgment and sentence for alleged ineffective assistance of counsel. We hold Robinson failed to specifically allege facts which, assumed true, would amount to ineffective assistance of counsel; therefore, we affirm.

I. Facts and Procedural History

Robinson was tried before a Lincoln County jury for one count of first-degree sodomy (victim under the age of twelve), seven counts of use of a minor in a sexual performance (victim under the age of sixteen), five counts of first-degree sexual abuse (victim under the age of twelve), and two counts of first-degree sexual abuse (victim under sixteen). The victims were Robinson's nephews and his brother's stepdaughter. The stepdaughter, two of Robinson's nephews, and Robinson's former girlfriend testified for the Commonwealth. At the conclusion of proof, the trial court entered directed verdicts of acquittal on two of the seven counts of use of a minor in a sexual performance. The jury returned guilty verdicts on the remaining counts. Robinson was sentenced to concurrent sentences of life imprisonment for sodomy, twenty years' imprisonment for each count of use of a minor in a sexual performance, ten years' imprisonment for each count of first-degree sexual abuse (victim under age of twelve), and five years' imprisonment for first-degree sexual abuse (victim under age of sixteen).

On direct appeal, the Kentucky Supreme Court held that the trial court abused its discretion by permitting one of Robinson's nephews to testify via closed circuit television. *Robinson v. Commonwealth*, 2014-SC-000661-MR, 2016 WL 3370939, at *6 (Ky. June 16, 2016). The Court found this error harmless except for the charge in which that nephew was the victim; therefore, it reversed on those

counts of first-degree sexual abuse and affirmed all of Robinson's remaining convictions. *Id.* at *9. Six months later, Robinson moved to vacate his judgment and sentence under RCr¹ 11.42, alleging his trial counsel and appellate counsel provided ineffective assistance on multiple grounds.² The trial court denied the motion without an evidentiary hearing. This appeal follows.

I. Analysis

A prisoner under sentence seeking relief must “establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42.” *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is required if the motion raises a material issue of fact that cannot be decided on the face of the record. *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (1993).

RCr 11.42 motions alleging ineffective assistance of counsel must survive the twin prongs of “performance” and “prejudice” provided in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

¹ Kentucky Rules of Criminal Procedure.

² Many of the arguments Robinson raised in his memorandum before the trial court were not addressed in his brief before this Court; therefore, we will not address those arguments. See *Stage v. Commonwealth*, 460 S.W.3d 921, 922 n.1 (Ky. App. 2014); *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979).

A “deficient performance” contains errors “so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Second, the appellant must show that counsel’s deficient performance prejudiced his defense at trial. “This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” An appellant must satisfy both elements of the *Strickland* test in order to merit relief.

Commonwealth v. McGorman, 489 S.W.3d 731, 736 (Ky. 2016) (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064). Appellate review of counsel’s performance under *Strickland* is *de novo*. *Id.* at 736.

III. Trial Counsel’s Alleged Ineffective Assistance

Trial counsel has an affirmative duty to conduct a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary. *McGorman*, 489 S.W.3d at 743. Robinson contends his trial counsel failed to investigate how his victims were raised and alleges it was common knowledge they were “habitual liars.” Robinson also contends trial counsel failed to challenge the conduct of a police detective who he alleged, without any supporting evidence, threatened to ruin trial counsel’s career on the eve of trial and silently mocked defense witnesses’ testimony in front of the jury. The Commonwealth argues these arguments were not preserved for appellate review. We agree.

Robinson’s motion before the trial court contended that trial counsel’s

pretrial investigation was deficient primarily because he failed to discover that his former girlfriend had married another man by the time she testified for the Commonwealth. Neither the conduct of the police detective nor the alleged mendacity of the Commonwealth's witnesses was referenced in any post-conviction filing with the trial court. An appellate court "is without authority to review issues not raised in or decided by the trial court." *Dever v. Commonwealth*, 300 S.W.3d 198, 202 (Ky. App. 2009) (quoting *Regional Jail Authority v. Tackett*, 770 S.W. 2d 225, 228 (Ky. 1989)); see also *Kesler v. Shehan*, 934 S.W. 2d 254, 256 (Ky. 1996). Accordingly, Robinson is not entitled to relief on these grounds.

Robinson did preserve for appellate review his argument that trial counsel provided ineffective assistance by failing to request a psychiatric evaluation or investigate his alleged history of mental health problems. However, Robinson did not explain how a psychiatric evaluation or an investigation into his mental health would have uncovered a possible defense to his charges or provide mitigating evidence at the penalty phase. A movant claiming his counsel was ineffective by failing to investigate must establish how he was prejudiced by the deficient investigation. *Commonwealth v. McKee*, 486 S.W.3d 861, 868 (Ky. 2016). That is, he must show a reasonable probability that the outcome of the proceedings would have been different absent counsel's errors. *Id.* "No

conclusion of prejudice . . . can be supported by mere speculation.” *Jackson v. Commonwealth*, 20 S.W.3d 906, 908 (Ky. 2000). Because Robinson failed to explain how a more thorough investigation into his mental health could have made a difference at either the guilt or penalty phases of his trial, he was not entitled to post-conviction relief on these grounds.

IV. Appellate Counsel’s Alleged Ineffective Assistance

Robinson argues appellate counsel provided ineffective assistance by failing to 1.) argue trial counsel’s alleged ineffective assistance on direct appeal; and 2.) challenge the sodomy conviction on direct appeal. The first argument was not preserved for appellate review and cannot form the basis for appellate relief. *Dever*, 300 S.W.3d at 202. Regarding the decision not to challenge the sodomy conviction on direct appeal, there is a strong presumption that appellant counsel’s choice of issues to present to the appellate court is reasonable appellate strategy. *Commonwealth v. Pollini*, 437 S.W.3d 144, 149 (Ky. 2014). A movant alleging his appellant counsel provided ineffective assistance by failing to raise an issue on appeal must demonstrate that the omitted issue was “clearly stronger” than those actually presented to the appellate court and that there is a reasonable probability the appeal would have succeeded had that issue been raised. *Id.*

Robinson argues a challenge to his sodomy conviction would have succeeded because the Commonwealth did not produce physical evidence of

sodomy and instead relied on testimony from witnesses with reputations for being “habitual liars.” This is an attack on the sufficiency of the evidence and would have provided grounds for appellate relief only if appellant’s counsel argued the trial court should have entered a direct verdict of acquittal on sodomy. Such an argument would not have been successful on appeal:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). “[T]he testimony of a single witness which is assigned a likelihood of truth is sufficient to support a finding of guilt . . . even though a number of witnesses may have testified to the contrary if, after consideration of all of the evidence in the case, the factfinder assigns greater belief to the accuracy and reliability of the one witness.” *Beaumont v. Commonwealth*, 295 S.W.3d 60, 67 (Ky. 2009) (quoting *Murphy v. Sowders*, 801 F.2d 205, 210 (6th Cir.1986)).

Thus, the Commonwealth did not need physical evidence to prove Robinson committed sodomy. The testimony from his victims and his former girlfriend was sufficient. Robinson has not alleged any specific facts that impeached the credibility of these witnesses. Even if he had, it would not have provided grounds to reverse on appeal because the credibility of the witnesses is the exclusive province of the jury. Because Robinson failed to show any meritorious argument was omitted on appeal, he was not entitled to relief for ineffective assistance of appellate counsel.

V. Conclusion

The order of the Lincoln Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Robinson, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Jason B. Moore
Assistant Attorney General
Frankfort, Kentucky